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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NEW JERSEY PUBLIC INTEREST RESEARCH GROUP, INC.,
Petitioner,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED*

1. Does a state university violate the First Amendment when it permits a student group to receive a mandatory, refundable student fee on the same terms as other groups which qualify under the university's neutral funding policy, despite the fact that the group takes and promotes positions on public policy issues, when the university has reasonably determined that the group has a very substantial educational component and contributes in a significant way to the education of the students attending the university?

2. If a state university's collection of a mandatory student fee of $4.00 per semester is determined to violate the constitutional rights of objecting students, even though the fee is repaid in full several months later, is it proper for an appellate court to impose an injunction prohibiting collection of the fee from all students, despite the availability of less intrusive remedies such as creation of an interest-bearing escrow account?

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* In addition to Joseph P. Galda, the respondents are Paul Ewert, Kristina Farrow Cypel, Thomas H. Odom, Joseph Randall Corman, Lori Keeley, Leslie Beebe, Leonard Scott Kelter, Edward D. Wickham, and Christopher Lepre, all of whom were plaintiffs in the district court and appellants in the court of appeals. Rutgers, The State University of New Jersey, Dr. Edward J. Bloustein, Dr. Norman Reitman, Donald S. McNaughton, David A. Werblin, Katherine Elkus White, Donald M. Dickerson, Sanford M. Jaffee, Robert Kaplan, Edward Kramer, Linda Stamato, Robert J. Torricelli, Mary White Bell and Walter K. Gordon, all of whom were defendants in the district court and appellees in the court of appeals, are also nominal respondents on this petition, although they have been aligned with intervening defendant New Jersey Public Interest Research Group, Inc. in this litigation and are filing their own petition for a writ of certiorari. There were no parties in the court of appeals other than those listed in this footnote. New Jersey Public Interest Research Group, Inc., a non-profit corporation, has no parent companies, subsidiaries, or affiliates within the meaning of Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion below is reported at 772 F.2d 1060, and is reproduced in the Appendix to this petition at 1a-40a.[1] The findings of fact and conclusions of law entered by the district court after trial are reported at 589 F. Supp. 479, and are reproduced at 71a-104a. This case had previously been considered by the court of appeals, and the opinion filed at that time is reported at 686 F.2d 159 (1982) and reproduced at 45a-65a. The district court decision which led to the first appeal is reported at 516 F. Supp. 1142 (D.N.J. 1981).

JURISDICTION

The judgment sought to be reviewed (67a-68a), is dated August 28, 1985, and was entered by the court of appeals on that date. On October 11, 1985, the court of appeals denied timely petitions for rehearing which had been filed by Rutgers, The State

[1] The Appendix to this petition, which is separately bound, will be cited in the form "__a."

University of New Jersey, et al. ("Rutgers" or the "University") and by petitioner New Jersey Public Interest Research Group, Inc. ("PIRG"), which intervened as a defendant in the district court and participated as a party in the district court proceedings and on appeal. 69a-70a. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Facts

In late 1971 and early 1972, Rutgers students who wished to engage in a variety of educational and advocacy activities collected thousands of signatures on petitions and then approached the University with the request that a refundable fee of $1.50 per student per semester be assessed to support their activities. 77a. Because the students sought funding only for the group which they wished to establish, the University rejected the proposal. 78a. Instead, it adopted a broader policy permitting any organization to utilize such a funding mechanism if it could demonstrate to the University's satisfaction that it had both substantial educational value and broad student support. 78a-79a. Rutgers President Edward J. Bloustein, several committees of the University's Board of Governors, other University officials, and the University Senate—the body through which administrators, faculty, and students at Rutgers participate in the formulation of policies of an educational nature—were all involved in developing this neutral policy. 79a-81a. The University's Board of Governors then approved the policy, which was amended once in 1973. 78a & n.6.

In order to qualify under the policy, which is reproduced in the Appendix at 105a, an organization seeking funding must demonstrate that it will contribute significantly to the educational mission of Rutgers. It does this by submitting a "concept plan" which explains the educational role that the organization intends to play. The plan must be reviewed and approved by the University Senate and the President, and the organization must participate in a referendum in which it receives a minimum affirmative vote of more than 25% of all eligible voters at a particular campus or school, as well as a majority of those actually voting. 79a. Students who oppose funding for a group are free to campaign against it, and they may also seek funding under the policy for other groups which they support. 79a-81a, 101a. The concept review and referendum process must be repeated every three years. 105a. PIRG and *The Daily Targum*, the undergraduate newspaper at Rutgers' New Brunswick campus which takes editorial positions on political issues and endorses candidates running for public office, have qualified to receive funds under the policy, and no group has ever been denied funding under the system. 81a.

PIRG has engaged in a wide variety of activities in the more than a decade that it has been active at Rutgers. Environmental protection has been its primary area of concern, amounting to approximately 40% of its program. 86a. For example, hundreds of Rutgers students have participated in PIRG's "streamwalking" program, in which students "wade in boots through streams attempting through scientific testing to discover hidden illegal sources of pollution into New Jersey's fresh water systems." 86a-87a. PIRG has also published dozens of reports, studies, consumer guides, pamphlets, directories and surveys, and it has sponsored "debates, lectures and public fora on matters of public interest and concern." 86a. As a small proportion of PIRG's overall activities, the organization also engages in lobbying to promote some of its positions. 87a-88a. As will be described more fully below, most of PIRG's research and advocacy are carried out through an internship program, in which students work under the direct supervision of PIRG staff members and often receive

academic credit by fulfilling the requirements set by members of the Rutgers faculty.

PIRG is governed by students elected by their peers to serve as members of PIRG boards of directors at the local (campus) and state levels. 82a. The local boards of directors are responsible for PIRG's activities on each constituent campus of Rutgers. 82a-83a. Local board members elect the members of the State Board of PIRG, which ultimately governs the organization, sets policy, and chooses the projects and activities in which PIRG becomes involved. 83a. The representation of each Rutgers campus on the State Board of Directors, which is composed entirely of students, is based on the relative sizes of the constituent campuses. *Id.*

Any student at Rutgers, whether or not active in PIRG, may suggest projects for the consideration of PIRG's Board of Directors. 83a. The projects and positions of PIRG are selected annually, and no Board is bound by what was done in previous years or is able to bind future Boards. *Id.* The executive director is chosen by the Board and oversees the organization's activities on a day-to-day basis. 83a-84a. There are additional staff employees who advise the students and assist in the development and execution of projects, but they are not members of the Board. 84a.

The PIRG fee, which was originally $1.50 and is now generally $4.00 per student per semester, is refundable in full upon request. 80a-81a, 105a.[2] Rutgers describes the fee as mandatory, but does not impose any sanction on those who do not pay it, nor does the University take any steps to compel payment. 81a, 103a n.12. A leaflet that describes PIRG, its activities, and the refund procedure is enclosed with each term bill. 81a-82a. The back of the leaflet contains a simple form which those students desiring a refund must submit to PIRG. 82a. Although plaintiffs were given

[2] The fee was $3.50 per student per semester at the time of the trial.

extensive discovery, they failed to produce any evidence that any Rutgers student has been discouraged by Rutgers, PIRG, or anyone else, from requesting a refund of the fee, nor was there any showing that any student has been subjected to any reprisal or punishment for requesting or receiving a refund. *Id.*

Approximately three to five percent of the students paying the PIRG fee request refunds. 81a. When PIRG receives a refund form, it contacts Rutgers to determine whether the student has in fact paid the fee. 82a. After it receives this verification from Rutgers, PIRG sends out refund checks, generally in the latter part of the semester in which the fee is paid. 82a. At the beginning of each semester, Rutgers advances to PIRG up to ninety percent of the funds collected for PIRG from students upon registration. 82a. Later in the semester, or during the following semester, Rutgers pays PIRG the balance of the fees collected, less the expenses of administering the funding system. *Id.*

The Litigation

This action, brought under 42 U.S.C. § 1983, was filed on September 4, 1979, by three students who were at the time enrolled at Camden College of Arts and Sciences, a component of Rutgers. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343. The plaintiffs contended that Rutgers' neutral funding policy is unconstitutional to the extent that it permits mandatory student fees to be paid to PIRG, an organization which takes positions with which plaintiffs disagree. The plaintiffs' claims were primarily based on this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which recognized a right to object under certain circumstances to compelled payments which will be used to advance ideological positions with which the payor disagrees.

The district entered summary judgment for the defendants, holding that the plaintiffs had not stated a claim under *Abood* because the mandatory fee collected by Rutgers was refunded in full to any student upon request. On appeal, the United States Court of Appeals for the Third Circuit reversed this ruling and remanded the case for trial. Judge Adams, writing for a

unanimous three-judge panel, directed that the trial be conducted in accordance with the following principles:

> Although many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment. This deference stems from the long-standing recognition that the university as a whole functions as a forum for the exchange of diverse views. As the Supreme Court has observed, "[t]he college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James,* 408 U.S. 169, 180 (1972); *Widmar v. Vincent,* [454 U.S. 263], 102 S. Ct. 269, 273 n.5 (1981). The holdings in *Veed* [*v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974)] and *Arrington* [*v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975)] thus correctly indicate that the university has broad latitude in providing an opportunity for students to participate in—and to oppose—the expression of a broad spectrum of ideology.
>
> To overcome the presumptive validity of the university's judgment that an organization contributes to the university community, and to make out a prima facie case that exaction of the fee conflicts with the mandates of the first amendment, persons objecting to the fee must establish that the challenged group functions essentially as a political action group with only an incidental educational component. At that point the burden of producing evidence to counter the plaintiffs' showing or to otherwise demonstrate a compelling state interest shifts to the university. We do not rule out the possibility that, even in the face of an unrebutted prima facie showing, the university might demonstrate a compelling state interest by establishing the importance of the challenged group's contribution to the university forum.

59a-60a.

After remand, the plaintiffs filed a second amended complaint which added seven additional student plaintiffs and which named Rutgers itself as a defendant.[3] A ten-day bench trial was held in early 1984, and following it the district court issued detailed findings of fact and conclusions of law and entered judgment for defendants on the ground that the plaintiffs had "failed to overcome the presumptive validity of the University's judgment and have thus failed to make out a prima facie case that their constitutional rights have been violated." 104a. The court rejected plaintiffs' claims because it found that the "administration at Rutgers has made a carefully reasoned decision that PIRG is a valuable educational adjunct to the more traditional classroom activities at the University." 99a. The court noted that "PIRG is one of many organizations at Rutgers that takes positions on issues of social importance and works to advance its positions. It is thus one of many voices in the University's marketplace of ideas. Student funding of most of the other 'voices' in the University community is mandatory and non-refundable, as part of the general student activities fee." 100a-101a.

In addressing the question of whether PIRG's educational component is "incidental" to its advocacy on public issues, the court relied on four different types of evidence in finding that it is not. The first was the history of the neutral funding policy, which has been described above. Second, based on the testimony of students who had worked on PIRG projects or participated in the governance of the organization, the court found that PIRG "provides leadership positions, opportunities and experiences which allow students to develop organizational, group management and communications skills." 101a. Moreover, the court concluded, PIRG's "wide-ranging internship program" offers "exceptional opportunities for students to learn through actual field experiences, to apply the information they learn in class to practical situations," and to broaden their contacts outside the immediate University community. *Id.*

[3] The plaintiffs sought to maintain the case as a class action, but the district court denied certification. The court of appeals, without discussion, upheld that ruling.

The third strand of testimony was that of Rutgers faculty members, most of whom testified that PIRG internships "are superior to other available internships, primarily because of PIRG's excellent supervision of student interns, because PIRG is on-campus and accessible to both faculty and students, and because PIRG is an organization that works on issues of particular interest to students." 102a. The fourth element of defendants' proof was the testimony of eminent educators from other universities which, when confronted with the same question as Rutgers faced in 1972 concerning the PIRG concept, reached the same conclusion concerning such an organization's potential to make a substantial contribution to the education of students. 102a. Defendants presented expert testimony on this issue from Dr. Joseph S. Murphy, Chancellor of the City University of New York, Dr. Robert C. Wood, former President of the University of Massachusetts, and Dr. Donald Zander, Associate Vice President for Student Affairs at the University of Minnesota. 97a-99a. Based on their observation of the actual activities of PIRGs at their schools, and their review of PIRG's projects at Rutgers, these experts all testified, as did Rutgers President Dr. Bloustein, that in practice PIRG provided the substantial educational benefits which were hoped for when initial approval was given for the group to utilize the neutral funding policy. 102a.

On appeal, the Third Circuit reversed in a 2-1 decision and remanded the case to the district court "for the entry of an order enjoining the assessment of the mandatory fee payable to PIRG." 18a. The majority opinion, written by Judge Weis and joined in by Judge Wisdom of the Fifth Circuit, recognized that "PIRG is politically nonpartisan," and that "the training PIRG members may receive is considerable," but nonetheless concluded that the mandatory, refundable fee is unconstitutional. 4a, 13a. The court observed that PIRG's "staff and student members have lobbied for a federal student assistance act, the Equal Rights Amendment, a nuclear weapons freeze, and the enactment of the Pine Lands Preservation Act." 4a. From that, it concluded that PIRG's "educational benefits are only 'incidental'—arising from or accompanying the principal objectives—and subordinate to the

group's function of promoting its political and ideological aims. It is not quantity that determines whether the benefit is incidental in circumstances such as these." 13a.

Judge Adams, who had written the Third Circuit's opinion on the earlier appeal("*Galda I*"), dissented for a number of reasons, among them that the majority was departing from the holding of *Galda I* and that it was in effect overturning the factual findings made by the district judge concerning the nature of PIRG's activities without applying, or even mentioning, the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). Judge Adams also noted that the majority's holding, while purporting to further First Amendment interests, would actually frustrate them by requiring public universities to exclude certain student groups from open forums solely because of the positions taken by them:

> The majority's result . . . would effectively inhibit political speech under the rubric of the First Amendment . . . . I would hold that where a state university establishes an educational equal access forum funded by student fees, it does not impermissibly violate objecting students' First Amendment rights by directing their fees to particular groups, so long as it grants access to the funding mechanism on educational and equal access grounds.

38a.

Rehearing petitions filed by the University and PIRG were denied by the Third Circuit, with Judges Adams and Becker voting in favor of rehearing *en banc*. 69a-70a. Even though there had been no briefing on the issue of relief, and PIRG's rehearing petition specifically challenged the breadth of the injunction ordered by the court of appeals, the court declined to modify its judgment. However, the court of appeals granted a stay of its mandate through December 17, 1985, to permit the defendants to seek a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE PROPER ROLE OF FEDERAL COURTS IN OVERSEEING EDUCATIONAL JUDGMENTS MADE BY STATE UNIVERSITIES, WHICH THE COURT BELOW DECIDED IN A MANNER INCONSISTENT WITH PRIOR RULINGS OF THIS COURT.

The decision below is ostensibly based on the need to accommodate the First Amendment rights of a handful of students at Rutgers who object to paying a fully-refundable $4.00 fee each semester to support PIRG. However, the decision, if allowed to stand, will in fact force state universities to undertake exactly the type of content-based regulation of student groups which was found by this Court to be unconstitutional in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Healy v. James*, 408 U.S. 169 (1972).

I. THE DECISION BELOW WOULD COMPEL STATE UNIVERSITIES TO REGULATE THE CONTENT OF THE EXPRESSION OF STUDENT GROUPS, WHICH WOULD SERIOUSLY IMPAIR THE UNIVERSITIES' ABILITY TO CARRY OUT THEIR EDUCATIONAL MISSION AND EXPOSE THEM TO A MULTITUDE OF LAWSUITS BROUGHT BY OBJECTING STUDENTS.

This Court has long recognized "the right of the University to make academic judgments as to how best to allocate scarce resources" and "'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Widmar v. Vincent, supra*, 454 U.S. at 276, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result). This approach reflects the judgment that, "in general, colleges and universities are most likely to fulfill their crucial roles in our society if they

are allowed to operate free of outside interference." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 294 (1984)(Marshall, J., concurring in the judgment). *See Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment").

In this case, the court of appeals ruled that Rutgers violated the First Amendment rights of objecting students when it allowed mandatory, refundable fees to be collected from students under a neutral funding policy and permitted the funds to be used to support PIRG. Yet the factual findings made by the district court after trial, which have never been challenged and which could not successfully be challenged under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a), *see Anderson v. City of Bessemer City*, 105 S. Ct. 1504 (1985), establish both that the University's decision to allow PIRG to qualify under the funding policy was made in good faith and that PIRG "significantly enhances the educational opportunities available for students" at Rutgers. 99a, 102a-103a. The conclusion is thus inescapable that the effect of the decision below will be to overturn the judgment which Rutgers made in 1972, and has reaffirmed repeatedly since then, that its funding policy and the inclusion of PIRG in it produces substantial educational benefits for its students.

The decision below is especially troubling, and especially likely to draw Rutgers and other state universities into difficult litigation over the funding of student activities, because of the fact that Rutgers never decided to fund PIRG, as PIRG. The University *refused* to provide funding for PIRG alone when that was proposed, and instead adopted a neutral policy which was available to all groups and which was carefully crafted to broaden the range of educationally-beneficial activities which would be available to students at Rutgers. 78a-81a. In the terminology which has been employed by this Court, the University acknowledges that it created a "public forum" when it adopted its neutral funding policy in 1972. *See generally Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S. Ct. 3439 (1985); *Perry Education Association v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

This Court has recognized that "[i]n addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra*, 105 S. Ct. at 3449. Thus, even if it is assumed that the special funding policy adopted by Rutgers was not constitutionally mandated by the public forum doctrine, it is clear that the University created a public forum at least for groups that meet all of the conditions specified in the policy. And, as the record in this case establishes beyond doubt, the University has repeatedly found that PIRG satisfies those conditions.[4]

The single case decided by this Court which most directly addresses the constitutional issues presented here is *Widmar v. Vincent, supra*. There, a student group sought to hold religious meetings in the facilities of a state university, but the university denied access on the ground that it was required to do so by the Establishment Clause. Since the "University [had] opened its facilities for use by student groups," the "question [was] whether it [could] exclude groups because of the content of their speech," and the Court concluded that the Establishment Clause provided no adequate ground for doing so. 454 U.S. at 273. In so ruling, the Court rejected the argument that the creation of an open forum in a public university confers an imprimatur of State approval on the positions taken by the organizations which utilize the forum. Therefore, the aid given to religion by the particular application of

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[4] Contrary to the position implicitly taken by the court of appeals, the constitutionality of the University's funding policy and its application to PIRG must be determined by examining the University's motivation, not that of the students participating in PIRG activities. There was no question in *Widmar* about the religious motives of the students seeking to hold worship services on campus, yet it was held that there was no Establishment Clause violation because the university was promoting a secular purpose by creating the forum in which participation was sought. Similarly, it is undisputed here that Rutgers has acted for valid and sincere educational motives in adopting the funding policy and in allowing PIRG to qualify under it on the same terms as other groups. *See, e.g.*, 81a ("Rutgers President Bloustein firmly believes that PIRG has a valuable educational purpose and functions only incidentally as a political group").

an open-access policy to religious groups was "incidental" to the secular purpose underlying the policy itself. *Id.* at 274.

The decision below turns this First Amendment principle on its head by ordering the exclusion of PIRG from the funding policy. Since the University has created an open forum for groups qualifying under the funding policy, and has similarly created a broad forum for a wide variety of student groups funded through the policy as well as through the more traditional mandatory general student fee, it cannot exclude PIRG because of its expressive activities unless there is a compelling justification for such content-based discrimination. *Cornelius, supra,* 105 S. Ct. at 3448 ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest"); *Perry Education Association, supra,* 460 U.S. at 45-46.[5] Thus, in *Widmar*, this Court held that in order to exclude a religious group seeking to use university facilities, it had to "satisfy the standard of review appropriate to content-based exclusions." 454 U.S. at 170. Likewise, in *Healy v. James*, this Court held that the college would have to carry a "heavy burden" of justification if it was to deny to a chapter of Students for a Democratic Society the official recognition which the group sought under the college's established procedures. 408 U.S. at 184.

Not only does the court of appeals fail to explain how the demanding standard of *Widmar* and *Healy* could be met in this case, but it fails to discuss those cases at all, or even to cite them.

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[5] The court of appeals disregarded these precedents when it stated that the "University shoulders a heavy burden to justify its determination to levy the assessment." 15a. *See also* 17a (the "University has thus failed to show any compelling state interest that would justify overriding the plaintiffs' First Amendment rights"). Judge Adams, in dissent, articulated the proper standard to be applied when he observed that the "question that must inform the entire analysis . . . is whether a student's right not to have $3.50 temporarily exacted from him for a forum that supports a group with which he disagrees is a sufficiently compelling state interest to justify an exclusion based on the political content of the group's intended speech." 38a.

The position adopted by the court below—that Rutgers is constitutionally compelled to exclude PIRG from the public forum which the University created in 1972 and has maintained since then—is precisely that which was asserted by the university in *Widmar* and rejected by this Court. Although the asserted reason for the exclusion ordered in this case (the *Abood* doctrine) is not identical to that in *Widmar*, where the Establishment Clause was invoked, in each case the public forum doctrine, as applied in the university context, establishes that Rutgers is free to allow PIRG access to the funding mechanism on the same basis as other groups, and may in fact violate the Constitution if it excludes PIRG because of its expressive or advocacy activities. *See, e.g., Healy v. James, supra; Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983). *See generally Bender v. Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985)(No. 84-773, argued October 15, 1985); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983).[6]

Perhaps because of the almost universal use of mandatory student fees by state universities to support ideological activities with which at least some students are bound to object, the court of appeals stated that it was not addressing "the problem presented by a state university's allocation of a mandatory non-refundable

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[6] Although never specifically mentioning them, the majority below attempted to distinguish the "public forum" cases by stating that PIRG itself does not provide a broad forum for the expression of differing views. 10a-11a, 14a. First of all, to the extent that the court of appeals assumed that PIRG is "dedicated to advancing one position," 16a, it was ignoring the undisputed finding of the district court that the "projects and positions of PIRG are selected annually by the students governing the organization." 83a. *See also* 31a (Adams, J., dissenting). Second, it is obvious that no single student group will appeal to all students, and thus it is immaterial that "the educational benefits flowing from PIRG's activities will not be available" to the plaintiffs. 14a & n.4. The student groups involved in the *Widmar* and *Healy* cases represented only a minority of students at their respective campuses, yet that did not make them ineligible for admission to an open forum on equal terms with other groups. The court of appeals also seemingly accords PIRG *less* First Amendment protection because it must periodically demonstrate broad student support through renewal referenda (*see* 16a-17a), but there is no valid basis upon which a group can be subjected to content-based discrimination solely because its program finds substantial support in the community that it serves.

student activity fee." 10a. *See id.* at 16a. The court then attempted to distinguish the general activity fee from the PIRG fee, which it declared unconstitutional, by stating that under Rutgers' funding policy "an outside organization independent of the university and dedicated to advancing one position, is entitled to compelled contributions from those who are opposed." 16a. To the extent that the court below was relying on the fact that the University has no control over the positions which PIRG takes on issues, it failed to realize that it is the group's independence which helps establish the propriety of the open-access policy, and that the access permitted in *Widmar* would unquestionably have been unconstitutional if the student religious group had been under the university's direction.[7]

The fundamental error made by the court of appeals was to allow the *Abood* doctrine to be invoked at the behest of a handful of objectors to second-guess the decisions made by professional educators as to how students should be educated. As Judge Adams pointed out in dissent, the "mere possibility of such judicial oversight of educational decisions invites abusive litigation by any student who objects to the political position of a funded student group." 26a-27a.

By its own terms, the holding below would apply to any public forum which might be utilized by a student group if some other students might consider the group to be too ideological or too political, or if it takes any position with which they disagree. And, by inescapable implication, the decision threatens the entire

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[7] Petitioner does not dispute that a university which creates a public forum "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Association, supra,* 460 U.S. at 46. Here, the University has done precisely that by establishing the "concept review" and student referendum requirements, which are designed to assure that qualifying groups will carry on activities which are consistent with the purpose for creating the forum in the first place. Moreover, "the university has the capacity to keep tighter control on PIRG than on its internal student groups." 26a-27a n.5 (Adams, J., dissenting). Furthermore, the University's very purpose in adopting the challenged funding policy was to open up the University forum to groups which were ineligible to receive general student activity fee funds because they were independent of the University. 77a, 105a.

structure by which student activities are *funded at* almost all public educational institutions, since "no principled basis is advanced to distinguish the program in question here from the mandatory general activities fee that supports such student groups at Rutgers as the ACLU and [illegible] ACP, or indeed, from similar mandatory activity fee programs in state universities across the country." 26a (Adams, J., dissenting). Thus, this case presents vitally important questions of constitutional law which require review by this Court.

II. THE INJUNCTION ORDERED BY THE COURT OF APPEALS IS ALSO CONTRARY TO THE CONTROLLING PRECEDENTS OF THIS COURT.

The court of appeals directed that this case "be remanded to the district court for the entry of an order enjoining the assessment of the mandatory fee payable to PIRG." 18a. Even apart from the serious errors committed by the court below on the merits, this case warrants review in light of the clear conflict between the relief imposed and the teachings of *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 104 S. Ct. 1883 (1984).

In *Ellis*, this Court held that certain activities carried or by a union could not be financed out of compelled dues paid by objecting employees. Moreover, the Court declared that the union did not have the right to collect dues for such uses, even if the money was eventually returned to the employees, with interest. 104 S. Ct. at 1890. However, the Court did not impose a broad injunction of the type adopted by the court of appeals in this case, which stops collection of the PIRG fee entirely. Rather, it recognized that "there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts," that would vindicate the objectors' First Amendment rights while imposing only a slight burden on the union. *Id.* at 1890.

Without receiving any briefing from the parties, the court of appeals ordered that the district court enjoin collection of the mandatory, refundable PIRG fee, thereby precluding the more limited remedy, specifically approved by *Ellis*, of establishing an interest-bearing escrow account. Under such a system, PIRG and

the University could hold in escrow an amount sufficient to pay all refunds likely to be sought in a given semester. That way, objecting students could be assured that no fee paid by them would constitute even a temporary "involuntary loan" to PIRG, yet the existing fee collection process would not be unnecessarily disrupted. *See Robinson v. New Jersey*, 741 F.2d 598, 610-14 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985); *San Jose Teachers Association v. Superior Court*, 38 Cal. 3d 839, 700 P.2d 1252, 215 Cal. Rptr. 250 (1985), *petition for cert. pending sub nom. Abernathy v. San Jose Teachers Ass'n*, (No. 85-498, filed September 23, 1985). *But see Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 2700 (U.S. June 10, 1985)(No. 84-1503, argued December 2, 1985).

Although the *Ellis* argument was specifically made in PIRG's petition for rehearing, the court of appeals declined to modify its ruling. As a result, the decision below precludes development of an escrow procedure to protect the rights of objectors, if the present system is—contrary to the arguments presented in Part I above—finally determined to be constitutionally defective. Such an alternative would be especially appropriate in this case in light of the extremely minor dimension of any deprivation which can be said to flow from the collection of a $4.00 fee which is refunded in full upon request within several months after it is paid. *Ellis* establishes that there would be no violation of the First Amendment if an amount sufficient to pay all refund claims were segregated, and interest were paid. As Judge Adams observed, "whether and how the fee is refundable are crucial considerations in weighing competing interests and balancing relative infringements of rights," 23a, and under the circumstances presented here there can be no justification for granting any relief beyond the interest-bearing escrow account held by *Ellis* to be sufficient.

CONCLUSION

A writ of certiorari should be issued to review the judgment entered by the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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